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No. 84-635

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM ROBERT WOOLERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an eyewitness's in-court identification of the petitioner was required to be excluded from evidence on the ground that it was rendered unreliable by a suggestive line-up.

2. Whether the evidence was sufficient to sustain petitioner's conviction for attempted possession of cocaine.

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OPINIONS BELOW

The principal opinion of the court of appeals (Pet. App. 1a-10a) is reported at 735 F.2d 818. The opinion denying the petition for rehearing (Pet. App. 24a-27a) is reported at 740 F.2d 359. An earlier opinion of the court of appeals, which reversed a pre-trial order suppressing evidence, is reported at 670 F.2d 513, cert. denied, 459 U.S. 835.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on June 20, 1984. A petition for rehearing was denied on August 21, 1984 (Pet. App. 24a). The petition for a writ of certiorari was filed on October 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of attempted possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to a term of four years' imprisonment and a special parole term of three years.[1]

1. The evidence is summarized in the opinions of the court of appeals. See Pet. App. 2a-4a; 670 F.2d 513, 514-515, cert. denied, 459 U.S. 835 (1982). In brief, it showed that on August 6, 1979, customs inspectors in Houston, Texas, discovered cocaine hidden in an air freight shipment of saddles from Colombia. The shipment was addressed to a "Richard Freedman," and a telephone number was indicated. After an airline official left word with the answering service at that telephone number, a man identifying himself as Freedman telephoned the airline on August 9 and said that the package would be claimed that day. Freedman called a warehouse company to pick up and store the package, and he arranged for a delivery company to obtain the package from the warehouse. Lawrence Lopez, a driver for the delivery company, was sent by his dispatcher to a parking lot near the warehouse to meet Freedman and receive his instructions. Shortly after lunchtime Lopez, accompanied by his 11-year-old son, arrived at the parking lot in his pickup truck and waited for 45 minutes until he was met by two men in a Mercedes. The driver of the Mercedes got out and approached the driver's side of the truck. Lopez said, "Mr. Freedman?," and the man replied, "Yes." Lopez then

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[1]Petitioner has not challenged, either in this Court or the court of appeals, the special parole term he received for the attempt offense. See generally *Bifulco* v. *United States*, 447 U.S. 381 (1980). Petitioner is free to raise this issue in a proceeding under Fed. R. Crim. P. 35 or 28 U.S.C. 2255.

left the truck and stood two or three feet from Freedman. Freedman paid Lopez $200 in cash for delivery and storage services, instructed him to deliver the package to a Houston address, obtained a receipt, and left.

Lopez returned to his truck and drove it to the warehouse; he was followed by the two men in the Mercedes. When Lopez stopped at the front of the warehouse, so did the Mercedes, which parked across the street. The driver got out of the car, walked around to the front, and raised the hood as if he were checking the engine; however, the driver never took his eyes off Lopez's truck. Lopez then moved his truck to the rear of the warehouse, and again the Mercedes followed, parking within sight of both Lopez and his truck.

When Lopez entered the warehouse to pick up the package, he was met by police, who informed him that the shipment contained contraband and that he was "in trouble." At this point, Lopez gave the officers a description of Freedman and the address to which the package was to be delivered (which was that of the telephone answering service). The officers then pulled up behind the Mercedes and blocked its exit. The driver of the Mercedes put his car in reverse and backed into the officers' vehicle. After the impact, the officers drew their guns, closed in on the Mercedes, and ordered the occupants out of the car. When the occupants did not respond, an officer opened the door on the driver's side and observed a pistol in a visible side compartment. The occupants of the Mercedes, one of whom was petitioner, were arrested.

Shortly thereafter, an officer arranged for Lopez and his son to view a line-up at a nearby customs office. Lopez entered the line-up room and selected a man who was not petitioner. A DEA agent asked Lopez if he was sure, and Lopez stated that he was not. Lopez's son, who had been with him in the parking lot, stepped to the door. Within the hearing of his father, he pointed to petitioner as the man in

the parking lot. An agent asked Lopez again if he was sure about his selection, and encouraged him to take another look. Lopez then selected petitioner as the man he had met in the parking lot who had identified himself as Freedman.

At trial, both Lopez and his son presented in-court identifications of petitioner as the man they had seen in the parking lot. Lopez recalled the description he had given the officer that day, stating that the man was 5' 7" or 5' 8" tall, had a beard and mustache, and wore a white shirt, blue jeans, and brown boots. Lopez stated that his in-court identification of petitioner was based both on what he had seen in the line-up and what he recalled from the day in the parking lot.

2. On petitioner's appeal, the court below found that the line-up identification by Lopez was impermissibly suggestive. However, applying the factors set out in *Manson* v. *Brathwaite,* 432 U.S. 98 (1977), it concluded on the basis of the record in this case that the suggestive line-up did not lead to a substantial likelihood of misidentification. Accordingly, it upheld the admissibility of Lopez's in-court identification of petitioner (Pet. App. 5a-8a, 25a-26a).

ARGUMENT

1. Petitioner contends (Pet. 5-8) that Lopez's in-court identification should have been excluded at trial because of the likelihood that it was tainted by the suggestive line-up. This fact-bound argument does not warrant further review.

It is well settled that suggestive procedures will not require suppression of a witness's identification if it is reliable notwithstanding the improper procedure. See *Manson* v. *Brathwaite,* 432 U.S. 98, 114 (1977); *Neil* v. *Biggers,* 409 U.S. 188, 199-200 (1972); see also, *e.g., United States* v. *Burke,* 738 F.2d 1225, 1228-1229 (11th Cir. 1984); *O'Brien* v. *Wainwright,* 738 F.2d 1139, 1140-1143 (11th Cir. 1984).

"[R]eliability is the linchpin in determining the admissibility of identification testimony * * *." *Manson* v. *Brathwaite,* 432 U.S. at 114.

In evaluating reliability, this Court has adopted a "totality of the circumstances" test that requires consideration of five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the time between the crime and the confrontation. These factors must then be weighed against the effect of the suggestive identification. *Manson* v. *Brathwaite,* 432 U.S. at 114-117; *Neil* v. *Biggers,* 409 U.S. at 199-200.

The court below applied these factors to the facts in this case in concluding that there was no substantial likelihood of misidentification at the line-up and consequently that Lopez's in-court identification of petitioner at trial was admissible in evidence. The court determined that the reliability of the line-up was supported by the facts that (1) in the parking lot Lopez had viewed petitioner face-to-face in broad daylight for several minutes; (2) Lopez's description of petitioner to the police was detailed and accurate; (3) although somewhat uncertain at the line-up (where petitioner stood the farthest away from him), Lopez chose a person who closely resembled petitioner with respect to height, facial hair, and hairline; and (4) the line-up took place on the afternoon that the arrest had occurred. Militating against reliability were the factors that (1) at the time of their meeting in the parking lot, Lopez had no reason to give any special attention to petitioner's physical appearance, and (2) Lopez initially was uncertain at the line-up and first

selected a man other than petitioner.[2] Weighing these competing factors, the court found that Lopez's identification was not rendered unreliable by the suggestive line-up.

Petitioner contends that the court of appeals erred in reaching this conclusion because half or more of the relevant factors indicated that the identification was unreliable. As discussed above, however, the court determined that the majority of the considerations demonstrated the reliability of the identification. In addition, and more importantly, petitioner misconstrues the judicial function simply to involve an exercise in arithmetic. Contrary to his view, application of the governing legal standard calls for a "judgmental process" directed to the "fairness" required by due process. *Manson* v. *Brathwaite,* 432 U.S. at 113. The court below properly understood the required inquiry and expressly applied the legal principles established by this Court to the particular facts in the present case. Petitioner has advanced no reason that would warrant further review.[3]

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[2]The court also noted Lopez's frank acknowledgement at trial that his in-court identification of petitioner was a product of both the meeting in the parking lot and the line-up. However, since the court concluded that the line-up was not itself unreliable, the in-court testimony was clearly admissible irrespective of whether it was influenced by the line-up.

[3]Petitioner also contends (Pet. 5, 8) that the decision below conflicts with earlier decisions of the court of appeals. Any intra-circuit conflict that may exist, however, does not justify this Court's review. See *Wisniewski* v. *United States,* 353 U.S. 901 (1957). At all events, the decisions cited by petitioner are distinguishable on their facts. In *Swicegood* v. *Alabama,* 577 F.2d 1322, 1325-1329 (5th Cir. 1978), the court, applying *Manson* v. *Brathwaite, supra,* found that a suggestive line-up led to a sufficient possibility of mistaken identification because, inter alia, the witnesses had only a fleeting opportunity to view the criminal and provided only a generalized description to the police. In *United States* v. *Cueto,* 611 F.2d 1056, 1062-1064 (5th Cir. 1980), the court held that a photographic display involving a single picture was impermissibly suggestive and that the reliability of the identification was very

2. Petitioner also contends (Pet. 9-10) that the evidence was insufficient to sustain his conviction for attempted possession of cocaine with intent to distribute it. He asserts that there was no evidence showing that he knew what the packages contained or that he had a connection with the shipment from Colombia. This argument is without merit.

First, contrary to the premise of petitioner's contention, it is not necessary for the government's evidence "to rule out every hypothesis except that of guilt beyond a reasonable doubt." *Jackson* v. *Virginia,* 443 U.S. 307, 326 (1979); see also *United States* v. *Rivera-Sola,* 713 F.2d 866, 869 (1st Cir. 1983), quoting *United States* v. *Manley,* 632 F.2d 978, 987 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981); *United States* v. *Bell,* 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd on other grounds, No. 82-5119 (June 13, 1983). Rather, the evidence, whether direct or circumstantial, is sufficient if, viewed in its entirety in the light most favorable to the government, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. See *Jackson* v. *Virginia,* 443 U.S. at 319; *Holland* v. *United States,* 348 U.S. 121, 139-140 (1954). As the court below correctly concluded (Pet. App. 9a, 26a), this standard is satisfied by the evidence here, including that showing that petitioner answered to the name of "Freedman" in his meeting with Lopez, followed the various movements of Lopez's delivery truck containing the concealed shipment of cocaine, got out of the car and pretended to be checking the engine in order to continue his observation of Lopez's truck, and rammed the officers' car when they attempted to stop him. Petitioner thus " 'engag[ed] in

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weak under *Manson* v. *Brathwaite* because, among other things, the witness did not subsequently make a positive identification of the defendant and had not provided a detailed description of the criminal to the authorities.

activity centering on known contraband, activity that had no legitimate or logical explanation' " (*id.* at 9a). Petitioner's contention to the contrary is essentially "a jury argument" (*id.* at 26a), and the proof was adequate to allow the jury to find against petitioner.

Nor was the evidence insufficient as a matter of law to establish an attempt because petitioner had been involved in "mere preparation" rather than in a "substantial step" toward the substantive offense.[4] In considering what constitutes an attempt, the "federal courts have rather uniformly adopted the standard found in Section 5.01 of the American Law Institute's Model Penal Code (Proposed Official Draft 1962). This standard provides that the requisite elements of attempt are (1) an intent to engage in criminal conduct; and (2) conduct constituting a 'substantial step' towards the commission of the substantive offense which strongly corroborates the defendant's criminal intent." *United States* v. *Rivera-Sola,* 713 F.2d 866, 869 (1st Cir. 1983), citing, *e.g., United States* v. *Joyce,* 693 F.2d 838, 841 (8th Cir. 1982); *United States* v. *Monholland,* 607 F.2d 1311, 1318-1320 (10th Cir. 1979); and *United States* v. *Mandujano,* 499 F.2d 370, 376-377 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975). The court below explicitly recognized the distinction between "mere preparation" and attempt (Pet. App. 9a-10a). In this case, however, petitioner's efforts to obtain custody of the shipment from Colombia, including his meeting with Lopez and his surveillance of Lopez's truck, were clearly a substantial step toward gaining possession of the cocaine and confirm his criminal intent and commitment to the venture.

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[4]The jury was instructed that, in order to convict, it had to find that petitioner's act had so surpassed the preparation stage that, if not interrupted, it would have resulted in the commission of a crime (Pet. 9). Petitioner does not challenge this instruction.

Finally, the decision below does not, as petitioner suggests, conflict with decisions in other circuits. As the court noted in *United States* v. *Rivera-Sola, supra,* the federal courts appear to have adopted a consistent standard for attempt, and that is the standard that the Fifth Circuit has applied in both this case and others. See, *e.g.,* Pet. App. 9a-10a; *United States* v. *Mandujano, supra.* Indeed, the very decisions of the Eighth and Tenth Circuits that petitioner cites to support his claim of a conflict followed the same standard and relied on opinions of the Fifth Circuit. See *United States* v. *Joyce,* 693 F.2d at 841-842, and *United States* v. *Monholland,* 607 F.2d at 1316-1320; see also, *e.g., United States* v. *Bunney,* 705 F.2d 378, 381-382 (10th Cir. 1983). While the attempt inquiry is necessarily "fact specific" (*United States* v. *Rivera-Sola,* 713 F.2d at 866), there is no conflict on the applicable legal standard.[5]

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[5]In addition, *Joyce* and *Monholland* are distinguishable from the instant case. In *Joyce,* the court held that the defendant had not engaged in an attempt because he had "abandoned" his intention to violate the law "prior to the commission of a necessary and substantial step to effectuate" the planned purchase of cocaine (693 F.2d at 841); thus, even though the defendant had both "the opportunity and ability to commit the completed offense, * * * [he] refused to engage in conduct constituting a 'substantial step' toward commission of the completed offense" (*id.* at 842). See also *United States* v. *Rivera-Sola,* 713 F.2d at 871 ("in *Joyce* the defendant voluntarily withdrew from his planned purchase"). In contrast, in this case and in most others, the failure to complete the consummated offense occurred not because of voluntary abandonment but "because of events beyond the control of the attemptor" (*United States* v. *Joyce,* 693 F.2d at 841). In *Monholland,* the court found that the defendant's activity "was nothing more than preliminary discussion" and did not involve "a tangible act which constituted proximate and tangible evidence of a real effort" (607 F.2d at 1317); this "abstract talk" and "preliminary" and "preparatory discussion" (*id.* at 1318) was held insufficient to establish an attempt. Here, on the other hand, petitioner's conduct was clearly and directly related to the commission of the substantive offense and constituted a substantial step toward that end.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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